

5.0 PROCESS FOR DEVELOPING THE RECORD OF DECISION

This chapter describes the roles and responsibilities of the lead and support agencies in developing the ROD. Procedures to facilitate timely preparation, review, and final approval of the ROD are presented in this chapter, as well as dispute resolution procedures and the role of other Federal agencies in cleanup activities at Federal facilities.

5.1 OVERVIEW

As with the Proposed Plan, the lead agency has the responsibility for preparing the ROD and coordinating with the support agency and other lead agency program offices to seek or attain (as appropriate) concurrence on the Selected Remedy. Typically, the lead agency that prepares the RI/FS Report and the Proposed Plan will prepare the ROD, although this may vary from site to site. In many cases, EPA is the lead agency and prepares the ROD; however, the State can prepare the ROD for concurrence and adoption by EPA when the State is designated the lead agency in the CA. States may sign the ROD without EPA concurrence for a non-Fund-financed State-lead enforcement response action (*i.e.*, actions taken under State law). Federal agencies must prepare RODs for Federal facility sites on the NPL, consistent with the terms of their IAGs and CERCLA §120. At NPL sites, RODs are generally signed jointly by EPA and the other Federal agency. At a Federal facility NPL site where the lead federal agency and EPA are not able to agree on the remedial approach, EPA selects the remedial action for that Federal facility site (*i.e.*, EPA concurrence is required for RODs at NPL sites on Federal facilities).

Although the roles of EPA and the State vary from site to site, EPA retains the final authority for remedy selection for all responses which are Federally funded or are to be carried out by a PRP pursuant to a CERCLA enforcement action.

5.1.1 State Preparation of ROD

For cases where the State is the lead agency or is using CERCLA enforcement authority, and it is a Fund-financed remedial action, the State must recommend a remedy for EPA concurrence and adoption. Through

the annual planning process, EPA and the State should designate those sites for which the State should prepare the ROD (NCP §300.515(h)(1)).

EPA intends to implement judiciously the process of State preparation of RODs, generally giving the State the lead only when both of the following conditions are met:

- The circumstances at a particular site warrant less EPA involvement and more State involvement.
- The State has demonstrated its ability to conduct remedial actions in an effective and responsible manner.

When the State is the lead agency for developing the RI/FS at a Fund-financed site, the State should prepare the Proposed Plan, and if EPA concurs, the State should publish the notice of availability, prepare the Responsiveness Summary, and develop the ROD. When the State prepares the ROD, the State must obtain EPA concurrence to receive Superfund monies or to use CERCLA authority for remedial action. If EPA concurs, then the ROD can be signed jointly by both agencies and EPA funding can be provided. In such cases, EPA retains final authority over remedy selection even though the State prepared the ROD.¹

5.2 ROLE OF LEAD AND SUPPORT AGENCIES

The responsibilities outlined below for the lead and support agency apply to EPA, a State, an Indian tribe, or another Federal agency, except where specifically noted.

¹ Not every remedial activity taken at sites is conducted under CERCLA §§104, 106, or 122. NCP §430.515(e)(2)(ii) notes that EPA concurrence is not required when a State selects a remedy at a non-Fund-financed State-lead enforcement site. Further guidance on State-lead enforcement actions is available in *Questions and Answers About the State Role in Remedy Selection at Non-Fund-Financed Enforcement Sites* (OSWER 9831.9, April 1991).

5.2.1 Lead Agency

The NCP states that the lead agency must reassess its initial determination that the Preferred Alternative provides the best balance of trade-offs, now factoring in any new information or points of view expressed by the State (or support agency) and community during the public comment period. The lead agency must consider State (or support agency) and community comments regarding the lead agency's evaluation of alternatives with respect to the other criteria. These comments may prompt the lead agency to modify aspects of the Preferred Alternative or decide that another alternative provides a more appropriate balance. The lead agency must make the final remedy selection decision and document that decision in the ROD (NCP §300.430(f)(4)(i)). In addition, the lead agency must publish a notice of availability of the ROD in a major local newspaper of general circulation and must make the ROD available for public inspection and copying at or near the facility at issue prior to commencement of any remedial action (NCP §300.430(f)(6)).²

Generally the lead agency performs the following steps during the ROD development process (see Highlight 5-1):

- Preparing the draft ROD;³
- Briefing lead agency upper management on the ROD;
- Submitting the draft ROD to other lead agency program offices and to the support agency for review and comment (see Consultation Procedures outlined in Appendix C);

² It is highly recommended that more active public involvement and State involvement activities be performed over and above the mandatory process specified in the NCP. These activities should be tailored to the specific needs of community. Active community and State agency involvement in the remedy selection process will help achieve EPA's general policy of implementing remedies that will achieve the reasonably anticipated future land uses and the potential beneficial ground-water uses where possible.

³ The remedy must be selected by the lead agency itself. A technical support contractor hired to assist a government entity in performing its duties or a PRP can not select the remedy. Moreover, any party other than the lead agency generally should not draft those sections of the ROD that relate to the remedy selection rationale (*e.g.*, the Statutory Determinations section).

- Reviewing and responding to comments and revising the ROD, if necessary;
- Briefing the Regional Administrator or delegated decision-maker (and, if necessary, the appropriate Headquarters manager or the Assistant Administrator of OSWER) as well as the designated personnel in the support agency;
- Submitting the ROD to the Regional Administrator or the Assistant Administrator of OSWER, if necessary, for signature (if a State or a Federal agency is the lead agency, both the lead agency and EPA should generally sign the ROD, except when it is a non-Fund-financed State-lead enforcement site); and
- Publishing the notice of ROD availability.

5.2.2 Support Agency

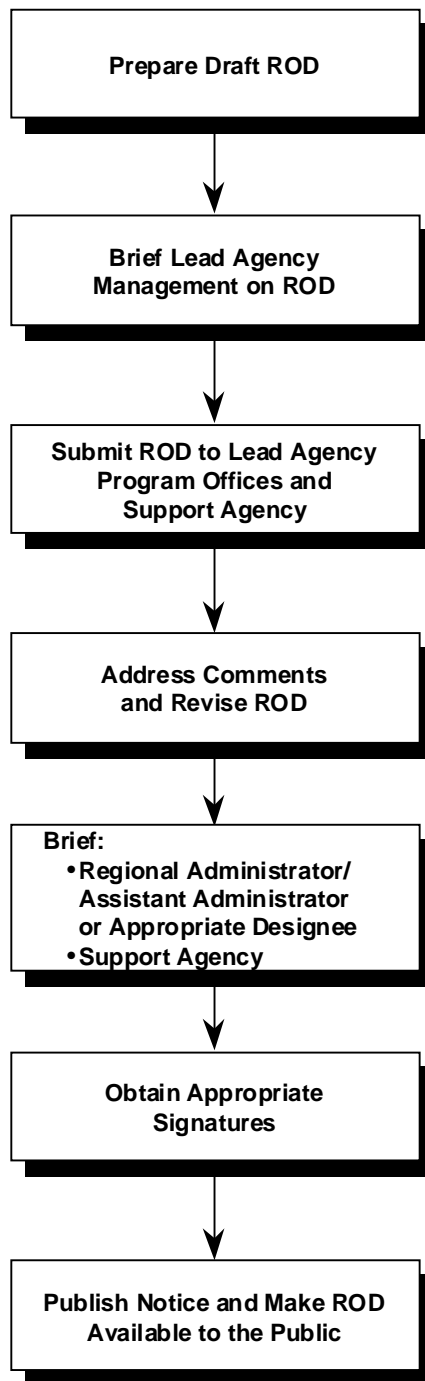
The lead agency must provide the support agency with an opportunity to review and comment on the ROD (NCP §300.515(h)(3)). The support agency should have an adequate opportunity to review the draft ROD before it is adopted. Unless otherwise specified in the SMOA or CA, 10 to 15 working days must be established in the support agency's schedule for review of the draft ROD pursuant to NCP §300.515(h)(3).

When a State is the support agency, its concurrence on a ROD is not a prerequisite to EPA's selecting a remedy, (*i.e.*, signing a ROD), nor is EPA's concurrence a prerequisite to a State's selecting a remedy at a non-Fund-financed State-lead site under State law (NCP §300.515(e)(2)(ii)).

5.3 DISPUTE RESOLUTION

Continuous interaction between the lead and support agencies throughout the remedy selection process should ensure final agreement on the Selected Remedy in a timely manner. In some instances, however, outstanding issues may arise between the lead and support agencies. The preamble to Subpart F of the NCP (55 FR 8781), "State Involvement in Hazardous Substance Response," recommends/suggests a dispute resolution process that EPA and the State could use. Chapter 2 of this guidance discusses the dispute resolution pro-

Highlight 5-1: Lead Agency Responsibility in ROD Development Process



cess presented in Subpart F of the NCP. Those resolution procedures may be used if none are specified in the SMOA or IAG.

5.4 ROLE OF OTHER EPA AND STATE PROGRAM OFFICES

Each agency should establish appropriate procedures and time frames for intra-agency review of RODs. An agency may need to coordinate with a number of program offices to ensure that technical and legal aspects of the ROD are defensible. When EPA is the lead agency, State agency participation during the RI/FS and Proposed Plan process is important to the successful selection of the remedy and its completion. In addition, concurrence from EPA's Office of Regional Counsel, and, as appropriate, EPA Headquarters, should be sought before the ROD is presented to the Regional Administrator (or Assistant Administrator, if the ROD has not been delegated to the Regional Administrator) for signature. Regional and State legal counsel should be involved early in the remedy selection process to help identify ARARs, ensure that all enforcement-sensitive issues are presented properly, and to ensure that the ROD is legally defensible.

5.5 ROLE OF OTHER FEDERAL AGENCIES

Executive Order 12580 delegates the authority for carrying out CERCLA §§117(a) and (c) to Federal agencies with Federal facilities under their jurisdiction, custody or control. A Federal agency, therefore, must issue the Proposed Plan. The IAG among the lead Federal agency, EPA and, in many cases, the State establishes the responsibilities of each party for ROD preparation and review.

For sites under its jurisdiction, custody or control, a Federal agency has the lead responsibility for preparing the draft ROD in accordance with Chapter 6 and, when appropriate, Chapter 8 of this guidance, and for carrying out the lead agency responsibilities specified in this chapter. At NPL sites the Federal agency should prepare the draft ROD, taking into consideration new information and comments received during the public comment period, and Federal facilities should submit the draft ROD to EPA (and, where designated in the IAG, the State) for EPA's written approval. The Regional or OSWER Assistant Administrator's signature

(or the signature of the person to whom this authority has been delegated) constitutes final EPA "adoption" of the ROD.

The Federal agency should publish a notice of availability pursuant to CERCLA §117(d) and make the ROD available to the public before beginning the response action. At a limited number of NPL sites, the Federal agency and EPA will not be able to agree on the remedial approach for a site. If the parties are unable to agree on the draft, even after a dispute resolution process, EPA should select the remedial action for the Federal or State facility.

5.6 ROLE OF POTENTIALLY RESPONSIBLE PARTIES

Even when the PRP conducts the RI/FS, the lead agency, as designated by the SSC or CA, should write the ROD (see footnote #3). If the PRPs are not conducting the RI/FS, they should be kept informed of response activities through the community relations process and the Administrative Record file, and, where appropriate, through general or special notice letters. The lead agency could negotiate with the PRPs concerning RD/RA while the ROD is being written. These negotiations should be separate from the remedy selection process. Generally, documents that result from these negotiations are part of the Administrative Record file where they relate to, and will be considered in, the lead agency's selection of the remedy.

5.7 ISSUING NOTICE OF ROD AVAILABILITY

The ROD should be added to the Administrative Record file after it is signed. In addition, the lead agency must publish a notice of the availability of the ROD in a local newspaper. NCP §300.430(f)(6) states:

"After the ROD is signed, the lead agency shall: (i) Publish a notice of the availability of the ROD in a major local newspaper of general circulation; and (ii) Make the ROD available for public inspection and copying at or near the facility at issue prior to the commencement of any remedial action."

The public notice of availability of the ROD should be brief and factual. It need not be as extensive as the newspaper notification of availability of the RI/FS and

Proposed Plan, as described in Chapter 2. The notice should use a display advertisement format and should be published in a widely read section of the newspaper.

The ROD newspaper notification should include the following:

- Site name and notice of availability of the ROD.
- The date on which the ROD was signed.
- A brief summary of the major elements of the Selected Remedy.
- Details on the location and hours of availability of the Administrative Record file and/or the information repository.
- The name and telephone number of the individual(s) to contact for further information about the site and the remedy selected.

The lead agency may find it appropriate to provide information in the newspaper notification about support agency concurrence or nonconcurrence on the ROD. A ROD notice for a Federal facility, should specify that the ROD has been prepared by the relevant Federal agency and approved by EPA. Highlight 5-2 is an example of a newspaper notification, announcing the availability of the ROD.

Highlight 5-2: Sample Newspaper Notification of Availability of the Record of Decision

Record of Decision Now Available for EIO Superfund Site

The U.S. Environmental Protection Agency announces a Record of Decision (ROD) for the EIO Superfund Site. The ROD documents EPA's cleanup plan, including treatment and disposal of both contaminated soil and ground water.

Copies of the ROD are available at:

Nameless Public Library
619 South 20th Street
Nameless, TN 00000
(101) 999-1099
Hours: Monday through Saturday
9 a.m. to 9 p.m.

U.S. EPA Records Center, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303-3104
(555) 555-5555
Hours: Monday through Friday
8:30 a.m. to 5:00 p.m.

The Administrative Record file for the site, which includes the ROD plus all documents that formed the basis for EPA's selection of the clean-up remedy, is available for public review at the locations listed above.

For more information regarding the site, contact:

Joshua Doe
Community Relations Coordinator
U.S. Environmental Protection Agency
61 Forsyth Street, S.W.
Atlanta, GA 30303-3104
(555) 555-5555

Toll Free (800) 333-3333 between 8:30 a.m. and 5:00 p.m., Monday through Friday, excluding Federal holidays.

